NO. 21934

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOUIS PEREZ CERDA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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Codes

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I

JURISDICTIONAL STATEMENT

Appellant, LOUIS P. CERDA, was indicted on March 1, 1967, by the Federal Grand Jury for the Central District of California and charged in two counts with violations of Title 21, United States Code, Section 174 and one count with violation of Title 26, United States Code, Section 4705(a) [C. T. 2]. 1/

Count One of Indictment #37033-CD charges that on or about September 9, 1966, in Los Angeles County, appellant knowingly and

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1/ "C. T." refers to Clerk's Transcript of Record.

unlawfully received, concealed and facilitated the concealment and transportation of 10.900 grams of heroin, a narcotic drug, which, as the appellant then and there well knew, previously had been imported into the United States of America contrary to United States Code, Title 21, Section 174.

Count Two relates to the same date as in Count One and charges that appellant knowingly unlawfully sold and facilitated the sale of the same quantity of heroin as in Count One to an undercover assistant of the Federal Bureau of Narcotics.

Count Three relates to the same date and quantity of heroin and charges the unlawful sale to an undercover assistant of the Federal Bureau of Narcotics without obtaining a written order on a form issued for that purpose by the Secretary of the Treasury of the United States in violation of Title 26, United States Code, Section 4705(a).

On March 13, 1967, appellant was arraigned in Case No. 37033-CD before the Honorable E. Avery Crary, United States District Judge. Counsel was appointed to represent appellant and a plea of not guilty was entered whereupon the trial of the case was transferred to the Honorable Irving Hill, United States District Judge [C. T. 6]. On that same date, appellant and his counsel appeared before Judge Hill and jury trial of this case was set for April 4, 1967 [C. T. 5].

On March 28, 1967, Doctor Karl Von Hagen was appointed by the court to examine appellant [C. T. 7]. On April 4, 1967, appellant and his counsel again appeared in Federal Court before

Judge Hill and jury trial of case No. 37033-(IH)-CD was continued to April 25, 1967 [C. T. 11]. On April 11, 1967, Doctor Eric Marcus was appointed to examine appellant [C. T. 17].

On April 25, 1967, appellant represented by court appointed counsel again appeared before Judge Hill. After hearing testimony regarding appellant's mental competency and physical health, the court found appellant legally sane and able to cooperate with his counsel and able to stand trial. Appellant then moved the court for a continuance which motion was heard and denied after presentation of testimony. A jury was then impaneled and the trial of the case commenced [C. T. 24].

On April 26, 1967, defendant was found guilty as charged in Counts One and Two and not guilty as charged in Count Three [C. T. 27, 28]. On April 27, 1967, appellant was committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten years for the offense charged in Count One and for a like period of ten years for the offense charged in Count Two and it was further adjudged that the two ten-year sentences of imprisonment imposed commence and run concurrently making a total imprisonment of ten years [C. T. 29, 30].

On May 1, 1967, appellant filed a motion for a new trial which motion was heard and denied by the court on May 22, 1967 [C. T. 31-36, 46].

On May 4, 1967, defendant filed a timely notice of appeal [C. T. 37].

The offenses charged in Indictment No. 37033-IH-CD occurred in the Southern District of California, Central Division. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 174 and Title 26, United States Code, Section 4705(a). Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Section 174, Title 21, United States Code, provides in pertinent part:

> "Whoever . . . knowingly . . . received, conceals, buys, sells or in any manner facilitates, transportation, concealment or sale of any . . . narcotic drug, after being imported or brought in, knowing the same to having been imported or brought into the United States contrary to law, . . . shall be imprisoned not less than five or more than twenty years and in addition may be fined not more than $20,000.
>
> "For a second or subsequent offense . . . the offender shall be imprisoned not less than ten or more than forty years and in addition may be fined not more than $20,000.

"Whenever on trial for violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Section 4705(a), Title 26, United States Code provides in pertinent part that:

"It shall be unlawful for any person to sell, barter, exchange or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given on a form to be issued in blank for that purpose by the Secretary or his delegate."

III

STATEMENT OF FACTS

On September 9, 1966, at approximately 10:00 A. M., Federal Bureau of Narcotics Agent Edward Heath, while under the surveillance of other Federal agents, met with Mr. Charles Holmes at his residence. There Agent Heath searched Mr. Holmes for monies or narcotics with negative results [R. T. 119]. 2/ Agent

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2/ "R. T." refers to Reporter's Transcript of Record.

Heath had been advised that appellant, known as "Skippy", and Bill McGowen would arrive at the residence and that negotiations for the sale of heroin would then take place [R. T. 109].

At about 1:20 P. M. appellant and Mr. McGowen arrived at Mr. Holmes' residence in a 1959 Chevrolet belonging to appellant's wife and driven by him [R. T. 153]. Agent Heath was then introduced to appellant and Mr. McGowen for the first time outside the residence [R. T. 95-96, 195]. As per the appellant's instructions Agent Heath entered the 1959 Chevrolet and appellant proceeded to drive around the Los Angeles area. Enroute appellant questioned Agent Heath in regards to where he was living and how much "dealing" Agent Heath had done in an apparent effort to break down Agent Heath's undercover guise. Appellant finally agreed to sell him a half an ounce of heroin for $100 [R. T. 96-97]. Appellant then stopped, exited the vehicle, and went to a phone booth where he appeared to place a telephone call [R. T. 98, 120]. Upon his return to the vehicle, appellant stated that his "connection was ready" and that he would take Agent Heath and the others to another location since Agent Heath "could not meet the source of supply" and that he, appellant, "would take the money, pick up the heroin and come back" [R. T. 99].

Appellant then drove Agent Heath, Mr. Holmes and Mr. McGowen to the area of Mark Keppel High School in Alhambra, California and instructed them to remain there [R. T. 99, 121]. Agent Heath, Mr. Holmes and Mr. McGowen exited the vehicle at this location. Appellant then asked for the $100 for the heroin which

money was given to him by Agent Heath [R. T. 99, 121].

About 10 minutes later, appellant returned to this location whereupon he drove Agent Heath, Mr. Holmes and Mr. McGowen back to Mr. Holmes' residence. Appellant had gone to his source of supply to obtain the heroin [R. T. 153]. Enroute to Mr. Holmes' residence Mr. Cerda handed Agent Heath a Pall Mall package containing two rubber balloons filled with a brownish powdery substance [R. T. 100]. At Mr. Holmes' residence, Agent Heath and Mr. Cerda discussed future purchases of heroin [R. T. 100, 124]. After appellant and Mr. McGowen had left the area Agent Heath again searched Mr. Holmes for monies or narcotics with negative results [R. T. 133]. It was subsequently determined by a chemical analysis that the two rubber balloons contained approximately 10.900 grams of heroin [R. T. 84-85].

Appellant had previously been convicted for a similar offense [R. T. 133-134].

IV

ERRORS SPECIFIED BY APPELLANT

Appellant has specified the following points on appeal:

1. The trial court committed prejudicial error in refusing to grant appellant's motion for a continuance of the trial.

2. Appellant's motion for a judgment of acquittal made at the close of the Government's case on the grounds of insufficiency of the evidence, or in the alternative, that entrapment had been

shown as a matter of law should have been granted by the trial court.

3. The "procuring agent" instruction with respect to the allegations in Count One of the Indictment as to receiving, concealing and facilitating the concealment and transportation of a narcotic drug and with respect to the facilitation of a sale of narcotics as alleged in Count Two of the indictment should have been given by the trial court.

V

ARGUMENT

A. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN REFUSING TO GRANT APPELLANT'S MOTION FOR A CONTINUANCE OF TRIAL.

The continuance of a trial is directed to the sound discretion of the trial court and a denial of a continuance may be reviewed by this Court only where the discretion has been abused. Scott Corp. v. Kent, 309 F. 2d 891 (1962), cert. denied 372 U. S. 982. Appellant in his opening brief fails to establish how the denial of the continuance by the trial court was an abuse of discretion.

Appellant first appeared in Federal Court on March 13, 1967, at which time trial of the case was set for April 4, 1967. Trial was then continued until April 25, 1967 and it was on this occasion that appellant made his motion for a continuance. At no time did appellant make a request that the government subpoena the informant nor did the appellant himself issue such a subpoena. As appellant

himself indicates in his opening brief, the Government had advised him of the identity of the informant and that he would be available to him at the time of the trial. However, it is clear that the Government is not the guarantor of the informant's presence at trial. See United States v. D'Angiolillo, 340 F. 2d 453 (2nd Cir.), cert. denied 380 U.S. 955 (1965).

Appellant cites Roviaro v. United States, 353 U.S. 53 as authority for his contention. However, Roviaro is not controlling since in that case the Government refused to disclose the identity of the informer whereas in the case at hand appellant was fully advised well in advance of the trial date of the identity of the informant. Further, in Roviaro the court stated that it could not be assumed that the informer was known to appellant and available to him as a witness. However, in the present case the record establishes that appellant was well acquainted with Mr. Holmes, the informant, and knew where he resided.

In Velarde-Villarreal v. United States, 354 F. 2d 9 (9th Cir. 1965), it was held that if the government was actually unable by reasonable effort to produce the informant, that such inability would not require a dismissal of the case, unless of course, the government itself purposely saw to it that the informant disappeared. At page 12 the court said, "We know of no rule that the government is under any general obligation to produce an informer".

In the case at hand the government did make a reasonable effort to produce Mr. Holmes and continued to make such reasonable effort throughout the trial of this case. Federal Agent Antonio

Celaya testified that he was acquainted with Mr. Holmes, an undercover assistant; that he did not know the present whereabouts of Mr. Holmes; and that about one month before trial he called Mr. Holmes at his residence and determined that the phone had been disconnected for some time. Agent Celaya then personally went to the residence but was unable to locate anyone. He then checked the neighborhood and was advised that Mr. Holmes had moved. He then spoke with persons acquainted with Mr. Holmes and none had heard from him for some time. One person did state that Mr. Holmes might be in Oklahoma but Agent Celaya was unable to determine where in Oklahoma. Agent Celaya then inquired about Mr. Holmes' whereabouts with other persons without success. In addition Agent Celaya checked Mr. Holmes' employment and it was determined that Mr. Holmes had terminated his employment approximately 4 months previously, and had never returned. Agent Heath testified that he assisted Agent Celaya in an attempt to locate Mr. Holmes by calling the police department and it was determined that Mr. Holmes was not in custody. During the course of trial, Agent Heath and Agent Celaya continued to make an effort to locate Mr. Holmes without success. The court after hearing the foregoing testimony and reading the informant's statement, which statement was offered and admitted into evidence for the purposes of this hearing only, determined that the government in good faith attempted to bring Mr. Holmes forward as a witness and had made no effort to conceal him or his part in the transaction and that there was no assurance whatsoever that a continuance for any given period of

time would assure his presence [R. T. 30-48].

It is therefore respectfully submitted that the trial court did not abuse its discretion in denying appellant's motion for a continuance.

B. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION AND APPELLANT WAS NOT ENTRAPED AS A MATTER OF LAW.

Appellant contends that the evidence was insufficient to sustain the conviction and in the alternative that entrapment was shown as a matter of law. It is the government's contention that the facts and circumstances surrounding the September 9, 1966 transaction compel the conviction.

In a criminal case evidence on appeal is viewed in the light most favorable to the government. Hiram v. United States, 354 F. 2d 47 (9th Cir. 1965); Stein v. United States, 337 F. 2d 14, 16 (9th Cir. 1964); Mosco v. United States, 321 F. 2d 180, 181 (9th Cir. 1963), cert. denied 371 U. S. 842. This rule also includes all inferences to be drawn from the evidence. Yeargain v. United States, 314 F. 2d 881, 882 (9th Cir. 1963).

Until his introduction by Mr. Holmes, Agent Heath was a stranger to the appellant, yet Agent Heath, not the informant, was the one actually purchasing the heroin. In addition appellant admitted that he desired to get something out of this purchase and did not want to give up his source of supply of heroin. His story that he

agreed to obtain the heroin only because of the insistence of a friend is inconsistent with these circumstances. See Matysek v. United States, 321 F.2d 246 (9th Cir. 1963), cert. denied 376 U.S. 917. Also, if the appellant were merely doing this as a favor to a friend one might ask why he took such meticulous precautions both at Mr. Holmes' residence and at the area around Mark Kepple High School.

Appellant admitted on the stand that he became directly involved in this illicit transaction because " . . . if I introduce Mr. Holmes to my source of supply, he doesn't have to come to me, in case I was broke in the future and he want to get some, he can go directly to the source and I wouldn't make anything out of this." [R.T. 201].

The appellant's predisposition to commit the offense is relevant to the question of entrapment. Cf. Sorrells v. United States, 287 U.S. 435 (1932). Appellant was willing to meet and subsequently did meet with Agent Heath for the purpose of obtaining and selling heroin. Such a subsequent act may be considered as indicating a predisposition to commit the offense as charged. Trice v. United States, 211 F.2d 513 (9th Cir. 1954), cert. denied 348 U.S. 900.

Where, as here, the only evidence of entrapment is the appellant's own testimony. The prosecution need not produce evidence to the contrary since the jury may choose to disbelieve the appellant. United States v. Thomas, 351 F.2d 538 (2nd Cir. 1965). At page 539 that court commented:

"Presumably once entrapment is undisputedly shown by government witness as in Sherman v. United States, supra, the government would have to introduce testimony to show willingness. The rule is otherwise when defendant himself raises entrapment in his testimony. The trier . . . is permitted to disbelieve him and did." See also United States v. Masciale, 236 F. 2d 601 (2nd Cir. 1956); United States v. Pugliese, 346 F. 2d 861 (2nd Cir. 1965).

Furthermore the government established ample reason why the appellant should not be believed. The appellant had a prior conviction for a similar offense. According to his own testimony he supported his narcotics habit by selling narcotics and engaging in the illicit sale and traffic of heroin. Further, it was appellant's, not the informant's, source of supply of the heroin which source appellant did not want to lose. In addition, according to his own testimony, appellant fully expected to make something out of this illicit transaction. Certainly these facts alone are sufficient to rebut appellant's contention that entrapment had been established as a matter of law and to warrant sending the question to the jury.

In any event, an appellant who claims as does appellant Cerda, that he was merely a procuring agent for the purchaser thereby denying the sale, cannot raise the defense of entrapment as to the sale counts and here the sentence imposed is concurrent as to each of the counts upon which appellant was convicted. Dunbar

v. United States, 342 F.2d 979 (9th Cir. 1965).

The cases cited by appellant are not dispositive of the problems now before the court. In Sherman v. United States, 356 U.S. 369 (1958), the evidence of entrapment appeared, unlike the present situation, in the prosecution's own case. Furthermore, the court there emphasized the appellant's undisputed efforts to rehabilitate himself. Here the appellant himself testified that he was addicted at the time of the offense and that he sought to traffic in narcotics in order to sustain his addiction and make a profit and that he did not wish to lose his source of supply.

The facts in Henderson v. United States, 261 F.2d 909 (5th Cir. 1958), in which the court found entrapment established as a matter of law, differs substantially from the present situation. The appellant there was neither a user nor a seller of narcotics. The purchaser of the heroin there was friendly with the appellant rather than a stranger as in the case at hand. Furthermore, the informant there told the appellant where to get the narcotics and even furnished the specific telephone number for that purpose and there was no showing there that the appellant profited from the transactions. These facts therefore present an entirely different case from the one presently under consideration.

In Morales v. United States, 260 F.2d 939 (6th Cir. 1958) the appellant was not an addict and had no prior criminal record. At page 940 the court stated:

> "There was no proof that appellant had any contact with persons engaged in the illicit sale of

narcotics nor any evidence whatsoever of circumstances that would justify even a reasonable suspicion that he was engaged in the traffic."

Certainly in the present case we have considerably more than "reasonable suspicion" that appellant was engaged in narcotics traffic. We have his own admission to such.

C. THE PROCURING AGENT INSTRUCTION WAS PROPERLY GIVEN BY THE TRIAL COURT.

Whatever may be the law in other circuits, it is clear that in the 9th Circuit an appellant who establishes that he was a mere procuring agent can be convicted of those counts charging facilitation. Vasquez v. United States, 290 F. 2d 897 (9th Cir. 1961); Bruno v. United States, 259 F. 2d 8 (9th Cir. 1958).

In the case at hand, Count One of the Indictment charges the concealment and transportation and the facilitation of the concealment and transportation of approximately 10. 900 grams of heroin in violation of 21 U. S. C. 174; Count Two charges the sale and the facilitation of the sale of the same quantity of heroin in violation of 21 U. S. C. 174 and Count Three charges the sale of heroin in violation of 26 U. S. C. 4705(a). Appellant requested, and the court gave, the "procuring agent" instruction to the effect that the appellant was not guilty if he acted as an agent of another. This instruction was given with respect to Count Three and that portion of Count Two charging the sale of the heroin but was not given as

to the charge with respect to Count One and that portion of Count Two charging the facilitation of the sale. Appellant now claims that this was error under Prince v. United States, 264 F. 2d 850 (C. A. 3). In the Prince case, the court held that a showing that a defendant acted as a procuring agent for the buyer rather than as the seller would constitute a defense to a charge of facilitating the sale of a narcotic drug. In so holding the 3rd Circuit stands alone and its rational has been rejected by the 9th Circuit. Cf. Bruno v. United States, supra; Vasquez v. United States, supra; and others, Lewis v. United States, 337 F. 2d 541 (C. A. D. C.); United States v. Simons, 374 F. 2d 993 (C. A. 7). Moreover, two of the cases upon which Prince relied i. e. Sawyer v. United States, 210 F. 2d 159 (C. A. 2); and Adams v. United States, 220 F. 2d 297 (C. A. 5) held only that a procuring agent could not be a seller of a narcotic drug under the provisions of 21 U. S. C. 174. These cases do not hold that the procuring agent should be acquitted of facilitating the sale. The court in Prince also relied on United States v. Dornblut, 261 F. 2d 949 (C. A. 2). There is nothing in the Dornblut decision, however, that suggests the rule announced in Prince. Moreover, the Prince decision itself does not bar the conviction of a procuring agent for facilitating the transportation and concealment of heroin as charged in Count One of the present case. Cf. Vasquez v. United States, supra.

It is thus respectfully submitted that the court did not commit prejudicial error in limiting the "procuring agent" instruction to Count Three and the applicable portion of Count Two rather than to

all three counts of the Indictment.

VI

CONCLUSION

For the reasons stated above, the appellee respectfully prays that the judgment of conviction be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gabriel A. Gutierrez
GABRIEL A. GUTIERREZ